

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LEONARD GALLOWAY,

Defendant-Appellant.

UNPUBLISHED

June 20, 2006

No. 259900

Oakland Circuit Court

LC No. 04-196538-FC

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

Defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 22 ½ to 75 years in prison for his second-degree murder conviction, and two years in prison for his felony-firearm conviction. He appeals as of right. We affirm.

Defendant and his wife, Barbara Galloway, had been living off and on with the victim, Bill Corbin, for 24 years when the victim was found dead in his home. The victim had eight gunshot wounds. Defendant was found by Royal Oak police officers at the home of a relative and taken into custody. Defendant was read his rights, but waived them, choosing to answer questions about the victim's death. Defendant stated in the videotaped interview that he was angry with the victim because the victim touched defendant's wife frequently. Defendant stated he was drunk when he got a .22 rifle from upstairs in the house, intending to scare the victim, and that he shot the victim but did not recall how many times he shot him. After the shooting, defendant and his wife left the house and went to a friend's house, where they played cards and then slept. When defendant woke up, he and his wife went over to his wife's brother's house, where defendant was apprehended.

Defendant's first issue on appeal is that he was denied his right to have a properly instructed jury when the trial court gave an unwarranted flight instruction. Defendant further argues that he was denied his constitutional right to the effective assistance of counsel when defense counsel failed to object to the unwarranted flight instruction. While we agree that the flight instruction was unwarranted, since defense counsel expressed satisfaction with the jury instructions, we find that defendant waived any issue regarding his rights to have a properly instructed jury. See *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). We further find defendant's ineffective assistance of counsel claim fails because

defendant cannot show a reasonable probability that the outcome would have been different but for counsel's errors.

When reviewing a claim of ineffective assistance of counsel, our review is limited to the facts contained on the record if an evidentiary hearing was not previously held. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2002). Ineffective assistance of counsel claims are a matter of constitutional law, so we review the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

In Michigan, it is well established that evidence of flight is admissible. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Such evidence is probative because it may indicate consciousness of guilt, although evidence of flight itself is not sufficient to sustain a conviction. *Id.* A flight instruction can be supported by evidence that a defendant fled the scene itself, ran from the police, resisted arrest, attempted to escape custody, or left the state. *Id.* However, mere departure from a crime scene is insufficient to support a jury instruction on flight. *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989) (evidence that the defendant "merely walked away" from the crime scene was insufficient to support a flight instruction).

Here, evidence was presented that defendant left the victim's residence after he shot him on May 12, 2004. Immediately after the shooting, defendant went to a nearby friend's house; the next morning defendant went to his brother-in-law's residence, which was also nearby. Defendant stayed at his brother-in-law's residence until the police apprehended him there on May 14, 2004. Defendant did not call for medical aid or assistance for the victim in the two days that followed the shooting. We conclude that the evidence does not establish that defendant fled the scene itself, ran from the police, resisted arrest, attempted to escape custody, or left the state. Instead, defendant merely left the scene after he had committed the crime in question, and the evidence presented therefore did not support a flight instruction. *Hall, supra*, p 691. The trial court erred when it gave a flight instruction. *Coleman, supra*, p 4; *Hall, supra*, p 691.

Accordingly, defense counsel erred when he failed to object to the flight instruction and we therefore conclude that defense counsel's performance in this regard fell below an objective standard of reasonableness. *Toma, supra*, pp 302-303. However, since defendant gave a statement to detective Richard Morelli admitting that he shot the victim, and because defendant testified that he shot the victim, we cannot say that the result of the proceedings would have been different if defense counsel had made a successful objection to the flight instruction. We find

that defendant was not denied effective assistance of counsel by the failure to object to the flight instruction. *Id.*

Defendant's second issue on appeal is that the prosecutor denied defendant his right to a fair and impartial trial when the prosecutor argued facts not in evidence and referred to defendant's potential sentencing consequences during his closing argument. We disagree.

Defendant failed to properly preserve his claims of prosecutorial misconduct by making an objection at trial on the same grounds that he now raises on appeal. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999); *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). When a claim of prosecutorial misconduct is not properly preserved, we review the claim for plain error which affected the defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal is merited only if plain error caused the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of the defendant's innocence. *Id.*

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). A prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, but may argue reasonable inferences from the evidence to support his theory of the case. *Watson, supra*, p 588. A prosecutor's comments must be considered in light of the defense arguments. *People v Knowles*, 256 Mich App 53, 61; 662 NW2d 824 (2003). "[N]either the court nor counsel should address themselves to the question of the disposition of a convicted defendant"; rather the jury should focus only on the question of guilt or innocence. *People v Szczytko*, 390 Mich 278, 296-304; 212 NW2d 211 (1973). See also *People v Williams*, 218 Mich 436, 439; 188 NW2d 403 (1922). Determining and imposing punishment in Michigan has been and is the sole duty of the trial court, not the jury. *People v Cole*, 382 Mich 695, 718; 172 NW2d 354 (1969).

The prosecutor stated in his closing argument, in relevant part:

There's been some evidence that the Defendant was voluntarily intoxicated with alcohol or drugs when the alleged crime was committed. Voluntary intoxication is not a defense to the crimes charged here. It does not excuse the Defendant if he committed the crime. And that's an instruction – a legal instruction the Court will be giving you. The legislature recognizes that . . . I think the legislature recognizes and that's why the law was passed. And this is that people who want to voluntarily drink and voluntarily get intoxicated cannot use that to come into a courtroom and use that as an excuse to get a lesser penalty. In other words, don't reward somebody for being drunk, and don't reward somebody for being on drugs if they were on drugs – not in this case, but alcohol. You don't reward somebody for that and give them a better resolution because they voluntarily got drunk and as a result of doing that they did something they may not have normally done. They recognize that people are held – to be held accountable for their own actions. . . . I'd ask you to return a verdict consistent with the evidence in this case and consistent with justice in this case. Return a verdict of murder in the first

degree. Do not reward the Defendant for being intoxicated and being drunk. His actions meet the requirements of first-degree murder, and he's guilty. Please return that verdict.

Defendant argues that these comments improperly argued facts not in evidence, and improperly called the jury's attention to possible or probable sentencing consequences.

We disagree, and conclude that the prosecutor's comments amounted to nothing more than an accurate statement of Michigan's current law with regard to voluntary intoxication. MCL 768.37. Here, evidence was presented that defendant was drinking at the time of the incident, and that alcohol can have an impact on an individual's ability to think and function. Furthermore, defense counsel presented a theory that defendant did not have the ability to premeditate his actions because of the level of his intoxication. Therefore, the prosecution's comments did not argue facts not in evidence. *Knowles, supra*, p 61; *Watson, supra*, p 588. The prosecution's comments did not call the jury's attention to possible or probable sentencing consequences, but merely commented that the jury's verdict should not be mitigated to one of the lesser charges (second-degree murder or manslaughter) based on a theory of voluntary intoxication

Even if we found that the prosecution's comments were improper, the trial court properly instructed the jury on voluntary intoxication and properly instructed the jury that the court was the sole authority on the law and that if the attorneys said something different about the law, the jury should follow the court's instructions on the law. The trial court properly instructed the jury that the attorney's statements and arguments were not evidence and were not to be considered as such, and properly instructed the jury that it was the court's job to set the penalty, and the jury should not let potential penalty influence its decision. We find that the prosecution's comments did not deny defendant his right to a fair and impartial trial, let alone amount to plain error affecting his substantial rights. *Thomas, supra*, pp 453-454; *Watson, supra*, p 586.

Defendant's third issue on appeal is that the cumulative effect of the alleged errors requires that defendant's convictions be reversed. We disagree. We review this issue to determine if the combination of alleged errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). "Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial." *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002).

The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors would not merit reversal, but the effect of the errors must have been seriously prejudicial to warrant a finding that the defendant was denied a fair trial. *LeBlanc, supra*, p 591; *Ackerman, supra*, p 454. Absent the establishment of some error, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

While we did conclude that the trial court gave an unwarranted instruction on flight, which should have been objected to by defense counsel, we further concluded that the overwhelming evidence of guilt presented effectively rendered that error harmless. The evidence clearly established that defendant admitted that he was angry with the victim, that defendant went upstairs, got a gun, brought the gun downstairs to confront the victim, and shot the victim

multiple times. Defendant specifically stated that he aimed at the victim's chest. Dr. Kamu Virani, stipulated as an expert in forensic pathology, stated that the cause of the victim's death was multiple gunshot wounds. Given this evidence, we conclude that the cumulative effect of errors was not so seriously prejudicial that defendant was denied a fair trial, and we find that reversal is not required. *LeBlanc, supra*, p 591.

Defendant's final issue on appeal is that trial court abused its discretion when it scored offense variable five (OV5) at 15 points based on facts that were not reflected in the jury's verdict or admitted by defendant, which is in direct violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005). We disagree.

This Court reviews a sentencing court's scoring of a defendant's guidelines to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The sentencing guidelines apply to any enumerated felony committed on or after January 1, 1999. *People v Hendrick*, 472 Mich 555, 557; 697 NW2d 511 (2005); MCL 769.34(2). Under the sentencing guidelines act, a court must impose a sentence in accordance with the appropriate sentence range. *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001); MCL 769.34(2). Under the sentencing guidelines act, if a minimum sentence is within the appropriate sentencing guidelines range, this Court must affirm the sentence and may not remand for resentencing, absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); MCL 769.34(10). "Generally, to determine a minimum sentence range under the legislative sentencing guidelines, the sentencing court must first determine the offense category." *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004); MCL 777.21(1)(a). "The sentencing court must then determine which offense variables (OV) are applicable, score those variables, and total the points to determine the offender's offense variable level." *Id.* "The sentencing court also scores all prior record variables [(PRV)]." *Id.*; MCL 777.21(1)(b). "The offender's [OV] score and [PRV] score are then used with the sentencing grids to determine the recommended minimum sentence range under the guidelines." *Id.*; MCL 777.21(1)(c).

Second-degree murder is a class M2 offense. MCL 777.16p. Therefore, defendant's minimum sentence range was calculated using the sentencing grid contained in MCL 777.61. Defendant's OV score was 95 points (25 points for OV1, five points for OV2, 25 points for OV3, 15 points for OV5 and 25 points for OV6). Defendant's PRV score was seven points (two points for PRV5 and five points for PRV6). Therefore, defendant's PRV level was B and defendant's OV level was II. MCL 777.61. Thus, defendant's minimum sentence range was 162 to 270 months, and the trial judge accordingly sentenced defendant to 270 months to 75 years in prison on his second-degree murder conviction. MCL 777.61. In a June 8, 2005, order denying defendant's motion for a new trial and *Ginther* hearing and defendant's motion for resentencing, the trial court ruled that "defendant's Sentencing Information Report shall be amended to reflect zero points for [OV3]" and defendant's total OV score would accordingly be changed to 70 points. Since the trial court's changing of defendant's OV score did not affect defendant's minimum sentence range, MCL 777.61, defendant's sentence remained the same. If the guidelines were incorrectly scored but the correct score would not change the guidelines'

recommended range, resentencing is not required. *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004).

On appeal, defendant argues that the 15 points scored for OV5 should also be reduced to zero, which in turn, would change defendant's total OV score to 55 points. Defendant specifically argues that the scoring of OV5 should be changed to zero points because the scoring of 15 points was based on facts that were not reflected in the jury's verdict or admitted by defendant, and thus, is in violation of *Blakely, supra*, and *Booker, supra*.

In *Blakely, supra*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. However, our Supreme Court concluded that the limitation imposed on factual findings by *Blakely, supra*, only applies to determinate sentencing schemes, and thus, does not affect the indeterminate sentencing scheme embodied in the Michigan sentencing guidelines. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). We conclude that the United States Supreme Court's decision in *Booker, supra*, which held that the Federal Sentencing Guidelines were subject to a *Blakely* analysis and that any fact, other than a prior conviction, must be admitted by the defendant or proved to a jury beyond a reasonable doubt, does not affect the Michigan guidelines because the Federal Sentencing Guidelines also involve a determinate sentencing scheme. When determining a defendant's minimum sentence range, factual findings require a mere preponderance of the evidence. *People v Perez*, 255 Mich App 703, 712-713; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003). Information relied upon may come from several sources, "including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *Id.* The trial court did not abuse its discretion when it scored OV5 at 15 points based on facts that were not reflected in the jury's verdict or admitted by the defendant. *Id.* Even if we found that the trial judge should not have scored 15 points for OV5, defendant's adjusted OV score of 55 points would not affect defendant's minimum sentence range. MCL 777.61. Defendant is not entitled to resentencing. *Houston, supra*, p 473.

Affirmed.

/s/ Jessica R. Cooper
/s/ Janet T. Neff
/s/ Stephen L. Borrello